UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LAVEL DURANT,

Defendant.

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18 CR 702 (CM)

DECISION AND ORDER ON DEFENDANT'S SUPPRESSION MOTION

McMahon, C.J.:

Defendant Lavel Durant is charged by indictment with two counts of Hobbs Act Robbery. Before the Court is Durant's motion asking the Court (1) to suppress evidence of the pretrial photo array identifications by two victims of the charged robberies, and (2) to preclude the victims from making an in-court identification of defendant. Defendant asks that if the Court is not inclined to grant the motion on the papers submitted that, in the alternative, he be provided with additional discovery related to the identifications and allowed an evidentiary hearing on his motion. The Government opposes the motion and asks that it be denied without a hearing.

Background

The Government says that it expects the evidence will show at a hearing or trial that:

On August 10, 2018, defendant entered a cellular telephone store and had a brief conversation with a store employee ("Empolyee-1"), before displaying what appeared to be a weapon in his pants pocket, and told Employee-1 to open the cash register. (Dkt. No. 1 ("Compl.") ¶ 5(a)). Employee-1 handed defendant $976. *Id.* Before leaving the Store, Durant

stated, in sum and substance, "Keep your hands up and don't touch anything or I will come back and kill you." *Id.*

Officers with the New York City Police Department interviewed Employee-1 and reviewed videos and photos from surveillance cameras installed on buildings in the vicinity of the store. *See id.* ¶ 6. On August 18, the officers showed Employee-1 photographs from the surveillance cameras of a man who matched the description that Employee-1 provided. Employee-1 confirmed that the man in the surveillance photographs was the robber. The officers used the photographs to create a "Crime Stoppers" flyer. (Govt. Memo, Exhibit A).

On August 20, 2018, defendant returned to the same cellular phone store to rob it a second time. (Compl. ¶ 5(b)). Durant once again engaged a store employee (this time "Employee-2") in a conversation about cell phones, before going behind the counter and showing Employee-2 a weapon and stating, in sum and substance, "Put your hands up, don't call the cops, or I'm going to do something to you." *Id.* Durant took approximately $200 from the cash register and fled the scene. *Id.* Officers responding to the robbery drove Employee-2 around the area surrounding the store in an attempt to locate the robber. During that canvass, Employee-2 saw a man who looked like the robber, but was unable to get close enough to confirm the identification. Upon returning to the store, the officers showed Employee-2 the Crime Stoppers flyer, and Employee-2 confirmed that the man in the flyer was both the robber and the man observed during the police canvass.

Officers searched their databases and identified the defendant as fitting the descriptions of the robber provided by Employee-1 and Employee-2, and as a physical match of the man depicted in the surveillance photograph utilized in the Crime Stoppers flyer. *Id.* ¶ 6(g). On August 31, 2018, law enforcement utilized the above information to create a photo array. *See*

Govt. Memo, Exhibits B and C. The mugshots in the photo array were reportedly taken in August 2018, and depict black males between the ages of twenty-three and twenty-seven, with brown eyes, short black hair, and short black facial hair. The mugshots were altered by placing a piece of white paper over the left eye, where Durant has a distinctive tattoo. The photographs depict men with throat and neck tattoos of varying size and location, ranging from none at all in filler one, to alarge and dark one in filler six. The defendant's mugshot is in position three on the photo array.

On September 1, 2018, at approximately 1:45 p.m., a Detective Burke from the 40th precinct went to the cellphone store where the robberies occurred to show Employee-2 the photo array. *See* Ex. B. According to the Government, Detective Burke did not create the photo array and did not know which of the six men in the array was the target of the investigation—a "double-blind" procedure to guard against administration bias. Employee-2 identified the man in photo three as the man who robbed him, and stated he was "very sure" of the identification.

Later that day, at approximately 2:46 p.m., a Police Officer Perdomo from the 40th Precinct went to a different cellphone store in the Bronx where employee-1 was working—not the store where the robberies had occurred—and showed Employee-1 the photo array. *See* Ex. C. Like Detective Burke, Officer Perdomo played no role in constructing the photo array and did not know the target of the investigation. Employee-1 identified Durant as the man who robbed him, stating that he was "very sure" of the identification.

On October 1, 2018, defendant was charged in an indictment with two counts of Hobbs Act Robbery.

Relevant Legal Standard

"If there is a very substantial likelihood of irreparable misidentification" resulting from a pretrial identification "infected by improper police influence," then "the judge must disallow presentation of the evidence at trial." *Perry* v. *New Hampshire*, 132 S. Ct. 716, 720 (2012) (internal quotation marks omitted). When determining whether identification testimony should be precluded, a district court engages in a "sequential inquiry" assessing first "whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator." *Abdur Raheem* v. *Kelly*, 257 F.3d 122, 133 (2d Cir. 2001).

"The fairness of a photographic array depends on a number of factors, including the size of the array, the manner of presentation by the officers, and the array's contents." *United States* v. *Concepcion*, 983 F.2d 369, 377 (2d Cir. 1992). "Courts in this Circuit have held that a photo array containing six or more photographs is sufficiently large so as not to be unduly suggestive." *United States* v. *Morgan*, 690 F. Supp. 2d 274, 283 (S.D.N.Y 2010) (citing *United States* v. *Thai*, 29 F.3d 785, 808 (2d Cir. 1994) (collecting cases)). In determining whether an array is impermissibly suggestive, courts assess "whether the picture of the accused so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit." *Jarrett* v. *Headley*, 802 F.2d 34, 40–41 (2d Cir. 1986) (internal quotation and alterations omitted).

If "the identification evidence presents no due process obstacle to admissibility, no further inquiry by the court is required, and the reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury." *Id* (internal quotation marks omitted). If the pretrial identification procedure was unduly suggestive, the Court must consider whether the evidence should nevertheless be

admitted because "other factors indicate that the identification is independently reliable." *Brisco v. Ercole*, 565 F.3d 80, 89 (2d Cir. 2009). The factors, used to assess independent reliability, include (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the identification. *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)). These factors must be assessed "in light of the totality of the circumstances," and none of the "factors standing alone is dispositive of the existence of independent reliability." *Id.* (internal quotation marks omitted).

A defendant is not entitled to a *Wade* hearing unless he makes a "sufficient pre-trial showing of impropriety" regarding the challenged identification evidence. *United States* v. *Salomon-Mendez*, 992 F. Supp. 2d 340, 343 (S.D.N.Y. 2014). This is consistent with the broader rule that evidentiary hearings on suppression motions are required only if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact" are in question. *United States* v. *Pena*, 961 F.2d 333, 339 (2d Cir. 1992).

The Photo Array

The Identification Procedures Was Proper

Defendant argues that "between the tattoos, the differences in complexion, weight, and facial hair, the employees were choosing between two real suspects (positions 1 and 3)," and that "the photo array draws more attention to Mr. Durant than is constitutionally permissible, and, at a minimum, makes out the "threshold showing of suggestiveness" sufficient to warrant an evidentiary hearing. *United States v. Berganza*, 2005 WL 372045, at *9 (S.D.N.Y. Feb. 16, 2005) (DAB)." Def. Reply at 2. The Court disagrees.

As photo arrays go, and this Court has seen a few, the array in this case (shown above) is pretty good. Defendant's quibbling about the composition of the fillers suggests that he would not be satisfied with any array, short of one comprised of clones of the defendant—and that is not the standard. "The due process clause does not require law enforcement officers to scour about for a selection of photographs so similar in their subject matter and composition as to make subconscious influences on witnesses an objective impossibility." *United States v. Morgan*, 690 F. Supp. 2d 274, 283 (S.D.N.Y. 2010) (quoting *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir. 1977)). "The Government cannot be expected to produce photographs of persons identical with the accused except in minor details." *United States v. Fernandez*, 456 F.2d 638, 641 (2d Cir. 1972). "It is not required . . . that all of the photographs in the array be uniform with respect to a given characteristic." *Headley*, 802 F.2d at 41. Rather, the inquiry is whether or not Defendant's photograph was so unique that it "stand[s] out from all the rest." *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 976 (2d Cir. 1990).

In short, there was nothing about the composition of the photo array in this case that would in any way "suggest to an identifying witness that the defendant was more likely to be the culprit." *See Jarrett*, 802 F.2d at 40–41.

In regard to the administration of the array, defendant argues that the photo array "*may* have been suggestive," due to a number of possible errors in how it was administered. (Def. Br. at 7) (emphasis added). Defendant speculates that law enforcement may have shown Employee-1 or Employee-2 "the wanted poster with Mr. Durant's mug shot prior to conducting the photo array lineup." (*Id.*). But according to the Government, the wanted poster was created after the photo array identifications were conducted. In any event, Employee-1 and Employee-2 had

already identified the defendant, whether from surveillance footage or the Crime Stoppers flier which reproduced the surveillance footage, making the subsequent photo array a confirmatory identification, which is not unduly suggestive. *See, e.g., United States v. Collymore*, No. 16 Cr. 521 (CM), 2017 WL 5197287 (S.D.N.Y. Oct. 20, 2017) ("[T]he police merely confirmed [the witness's] identification of the defendant using a photo array of the defendant and five individuals of similar appearance—a routine police procedure firmly approved by precedent.").

Defendant continues his speculation suggesting that the lineups *may not* have been double blind. Def. Br. at 7–8. But this too is contrary to the Government's proffer that neither Detective Burke nor Officer Perdomo knew the defendant's position in the photo array.

Finally, defendant speculates that "the NYPD may have allowed Employee-1 and Employee-2 to conduct their identifications at the same time." (Def. Br. at 7). However, this notion is refuted by documents the Government represents that it produced to defendant in discovery which memorialize the date, time, and place of the identifications: Employee-2's photo array was administered on September 1, 2018, at 1:45 p.m., at the location of the robberies, and Employee-1's photo array was administered approximately one hour later, at a different cellular phone store.

Contrary to defendant's speculation, nothing in the way the photo array identifications were administered in this case would have suggested to Employee-1 or Employee-2 that "the defendant was more likely to be the culprit." *See Jarrett,* 802 F.2d at 40–41.

Identifications Appear to be Independently Reliable

Because the Court has determined that neither the composition nor the administration of the photo array was unduly suggestive, there is no need to proceed to the second step of the due process inquiry by examining the independent reliability of the identifications at issue. *United*

States v Lee, 660 F. App'x 8, 12 (2d Cir. 2016).

That said, even if the Court had found that the photo array was either innately suggestive or the showing of the array was done in a suggestive manner (findings this Court specifically did not make), the identifications by Employee-1 and Employee-2 appear to be independent reliable. Both Employee-1 and Employee-2 engaged in conversations with the defendant before the robberies, were face to face with the defendant as he grabbed cash from the register at which they were working, and were in a presumably well-lit store during daytime hours. Both witnesses also stated they were "very sure" during their respective photo arrays that the defendant was the robber and, contrary to the defendant's speculation, they were not allowed to collaborate before making that identification because they were not together. And both men picked defendant out in the photo array only days after independently identifying defendant from the surveillance footage.

Defendant's motion to suppress evidence of the pretrial identifications and to preclude any in-court identification is denied—no additional discovery or evidentiary hearing is required.[1]

This constitutes the decision and order of the Court.

Dated: May 14, 2019

Chief United States District Court Judge

BY ECF TO ALL PARTIES

[1] While the Court found a hearing unnecessary to determine that there was no due process obstacle to the admission of the Government's proposed eyewitness identification evidence, the reliability of those identifications is—like the credibility of the other parts of the prosecution's case—ultimately a matter for the jury. Accordingly, defendant will be afforded broad latitude at trial to cross examine the eyewitnesses and any other witness regarding the accuracy of those identifications.